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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1020

JOSEPH SWARTZ and FREDA SWARTZ, *Petitioners*,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MAY 23, 1958.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case of February 27, 1958.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed as an appendix hereto, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1958. Rehearing was denied on March 24, 1958. This petition for a writ of certiorari is filed less than 90 days after the denial of rehearing. The

jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does the Fifth Amendment give a United States citizen who marries an alien, which alien at the time of marriage has the status of a lawful permanent resident and does not commit a deportable offense thereafter, the right to rely on the state of the law at the time of marriage? Does, therefore, the retroactive application of Section 241(a)(11) of the Immigration and Nationality Act of 1952 to deport the alien spouse for an offense which was not deportable when committed or at the time of marriage violate the substantive due process right of the citizen wife under the Fifth Amendment to maintain her home and marital status in the United States and to retain her United States citizenship?

2. Does the retroactive application of Section 241(a)(11) of the Immigration and Nationality Act of 1952 violate the rights of an alien deportee under the *ex post facto* clause of the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law, . . ."

* * * *

Article I, Sec. 9, Cl. 3: "No Bill of Attainder or ex post facto Law shall be passed."

* * * *

Immigration and Nationality Act of 1952:

Section 241 [8 U.S.C. 1251]:

"(a) Any alien in the United States (including alien crewman) shall, upon the order of the Attorney General, be deported who

* * * *

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . ."

* * * *

Section 241(d) [8 U.S.C. 1251(d)]:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (e), occurred prior to the date of enactment of this Act."

* * * *

Section 405(a) [8 U.S.C. 1101, Note]:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes,[1] conditions, rights, acts,

[1] This word is a typographical error and should be read as "statuses." See *Lehmann* v. *Carson*, 353 U.S. 685, 688, footnote 3.

things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

STATEMENT OF THE CASE

The facts in this case are not in dispute. On or about August 3, 1908, the petitioner Joseph Swartz, then about seven years of age and a native of Rumania, was lawfully admitted to the United States for permanent residence. He has retained the status of a permanent resident since that time, never having become a naturalized American citizen.

On July 16, 1930, the petitioner Joseph Swartz was convicted in the District Court of the United States for the District of Minnesota on his plea of guilty to the first count of a two-count indictment charging that on June 30, 1927, he committed a violation of the narcotics laws. A sentence of imprisonment was duly imposed and petitioner served that sentence. At the time of petitioner's commission of this offense and his conviction therefor, neither the commission nor the conviction constituted a basis for deporting him from the United States.

On January 15, 1942, petitioner Joseph Swartz was married to petitioner Freda Swartz. Petitioner Freda Swartz is a naturalized citizen of the United States and has resided continuously in this country since 1925. She has never visited Rumania, has no knowledge of the Rumanian language and has no criminal record of any kind. She is a housewife. She has no outside employment and depends solely and entirely upon her husband, the petitioner Joseph Swartz, for her support and livelihood. They reside in Minneapolis, Minnesota.

As a result of their marriage, the petitioners have one living issue, a son Michæl Charles Swartz. This son was born in Minneapolis, Minnesota, on May 13, 1946, and hence is a natural born American citizen. He has at all times resided in Minneapolis and continues to attend school there. He has never traveled outside the United States. He can read and write the English language, but has no knowledge of any foreign language. As a minor, he continues to be fully and entirely dependent upon his father, the petitioner Joseph Swartz, for his support, livelihood and guidance.

In 1952, Congress enacted a revised Immigration and Nationality Act, Section 241(a)(11) [8 U.S.C. Sec. 1251(a)(11)] of which provides that any alien in the United States shall, upon the order of the Attorney General, be deported who

> "is, or hereafter at any time after entry has been, . . . convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs. . . ."

In 1953, some 26 years after the commission of his narcotics offense and some 11 years after his marriage, petitioner Joseph Swartz became the subject of deportation proceedings by the Immigration Service. In February 1955, a final order was entered ordering him deported under the provisions of the aforementioned Section 241(a)(11) on the sole ground that he had been convicted of a violation of the narcotics law committed in 1927.

The petitioners then instituted the instant proceeding in the District Court to review this final order of deportation by way of a declaratory judgment and

a request for injunctive relief. It was alleged that "if it is the conclusion of the Court that 8 U.S.C. Sec. 1251(a)(11), does purport to render a person deportable, who, prior to the enactment thereof, had a non-deportable status and who has not committed any act since the enactment of said legislation to place him under the terms of said provision, then such provision is in conflict with the Constitution of the United States to the extent to which it has retroactive effect in that it is *ex post facto* and in that it deprives plaintiff, Freda Swartz, of liberty and property without due process of law."

After filing an answer, the respondent filed a motion for judgment on the pleadings. The petitioners thereafter filed a motion for summary judgment. On July 15, 1957, the court entered a final order granting the respondent's motion for judgment on the pleadings and denying petitioners' motion for summary judgment.

Petitioners filed a notice of appeal. The Court of Appeals then granted a stay of the deportation order pending the final disposition of the appeal.

On February 27, 1958, the Court of Appeals affirmed the action of the District Court. It held that (1) petitioners' contention that Section 241(a)(11) was void under the *ex post facto* clause of the Constitution had been answered by this Court's decision in *Mulcahey* v. *Catalanotte*, 353 U.S. 692; and (2) the petitioner wife had no contract right or marital status which is so protected by the due process clause of the Fifth Amendment that her husband could not be deported by a retroactive application of the relevant deportation law. Circuit Judge Bazelon concurred in the result without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Decided an Issue That Is Both Novel and Important Under the Constitution and in the Administration of the Federal Deportation Laws.

In deciding this case, the Court of Appeals in effect recognized that "the legal union which the marriage created" is constitutionally protected against unwarranted destruction by a governmental authority. It held that deportation of the alien spouse for a 1927 offense which, in 1952, was made retroactively deportable, "put burdens upon the marriage," but since such deportation did not destroy the marriage the statute was not unconstitutional. The essence of the citizen wife's claim, the court said, "is a right to live in this country." Its decision implied that she did not have that right.

The decision below thereby raises for the first time vital questions as to the nature and the extent of the constitutional protection to be accorded the marital relation. And it further raises novel issues as to the power of Congress to impose its broad deportation authority in the context of a situation where the due process rights of an American citizen are thereby destroyed.

This Court long ago recognized that there is a liberty or right under the due process clause of the Fourteenth Amendment "to marry, establish a home and bring up children," a liberty which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to act." *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400. And it has also been established that those entering into a marital status thereby acquire

"a legal right to the affection and consortium of the other" and that the "deprivation of the same, intentionally caused by a third party, is legally actionable." *Fleming* v. *Fisk*, 87 F. 2d 747 (App. D.C.). "Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and the wife as wife. Any interference with those rights, whether of the husband or of the wife, is a violation, not only of natural right, but of a legal right arising out of the marriage relation." *Bennett* v. *Bennett*, 116 N.Y. 584, 590, 23 N.E. 17.

The instant case puts into focus for the first time the precise constitutional nature of this marital right and the extent to which it is protected against unwarranted interference by the federal government. Assuming that the Fifth Amendment recognizes and protects "the legal union which the marriage created," is that union protected—as the court below held—only against a voiding of the marriage contract or the legal union itself? Or is it also protected against the outlawry of certain benefits of the union which existed at the time of marriage and which were not placed in jeopardy by any action of the couple subsequent to marriage? Is not the marriage effectively destroyed if the government unfairly banishes one of the spouses so that the marital relationship may no longer be freely enjoyed?

Also brought into question by the decision below is the geographical scope of rights enjoyed under the Constitution of the United States. The court held that it was constitutionally sufficient if a citizen spouse were compelled by governmental action to choose between living abroad with her husband or living in

this country without him. But if there is a constitutional right to maintain a legal union of marriage, has that right any constitutional meaning if it must be pursued outside the geographical and jurisdictional limits of the Constitution? Is it an answer to a restriction on the pursuit of such a right within the United States to say that the right may be freely exercised in some foreign land, particularly in a Communist-dominated dictatorship? Can the Government, by unwarranted and unfair means, force a citizen spouse either to live without her husband or to follow him to some foreign land where life itself may be intolerable and to raise her citizen son under a Communist regime?

It is axiomatic, of course, that a citizen of the United States cannot be deprived of his right to live in the United States. It would thus clearly be unconstitutional for Congress to say that the petitioner wife, a citizen of the United States, may be deported for an act committed by her husband fifteen years before their marriage, for which he was not deportable at that time. Similarly, as the court below seemed to imply, it would be unconstitutional to destroy her marriage for that reason.

If, then, the 1927 offense of the petitioner husband could not constitutionally be a ground for (a) destroying the marriage contract, and (b) ordering the petitioner wife to leave the country, is it logical or constitutional to force her to choose between destroying the marriage by living apart from her husband or depriving herself of the right to live in the United States? The value of her right to live in the United States is pointed up by the fact that the petitioner wife here is a naturalized citizen who will lose her citizenship if she lives abroad with her husband for a period of five

years. 8 U.S.C. 1484(a)(2); *Savorgnan* v. *United States*, 338 U.S. 491. The choice put upon this petitioner by the court below is thus a momentous one, the choice between losing her husband or losing her citizenship.

Necessarily brought into question here is the conflict between this claimed constitutional right to pursue the marital contract within the confines of the United States and the power of Congress to deport undesirable aliens. That particular conflict has never before been considered or resolved by any court. The deportation power, of course, has always been considered broad and plenary. But broad and plenary powers are only such within the confines of the power itself. Every plenary power of Congress, whether it be the interstate commerce power or the deportation power or some other power, is necessarily limited by the provisions of the Bill of Rights and other portions of the Constitution. See *North American Co.* v. *S.E.C.*, 327 U.S. 686, 704-705; *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 100.

Thus the deportation power has been held subject to the constitutional requirement of procedural due process, a requirement that "derives from the same source as Congress' power to legislate and where applicable, permeates every valid enactment of that body." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. See also *Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U.S. 96, 101. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, this Court tested the deportation power against certain rights claimed under the free speech provision of the First Amendment and the due process clause of the Fifth Amendment, thereby recognizing the per-

tinency of those constitutional provisions in marking out the boundaries of the deportation power.

The deportation power of Congress accordingly must be measured in this case against the petitioner wife's constitutional due process right to the continuance of her marital status as vested in 1942. It is a conflict between an implied power of Congress and an express right of an individual citizen. A decision in this case by this Court would determine the rights of any United States citizen who has heretofore married or may hereafter marry a permanently resident alien, determining whether or not Congress may shatter the homes established after such marriage through retroactive application of the deportation laws. The issues raised by this case are thus clearly of major importance demanding the attention and consideration of this Court.

Obviously, of course, a woman who marries an alien does not thereby shield him forever against the possibility of deportation. On marriage, she assumes the risk that her alien husband may thereafter commit some offense that will subject him to deportation or to some other form of punishment that will effectively destroy the marital relationship. She has no constitutional right to the maintenance of her status in the face of the enforcement against her husband of valid criminal laws or of prospective deportation laws.

All that the petitioner wife contends here is that she is constitutionally protected in her martial status against the *retroactive* application of a deportation law against her husband. She is protected against a law which reaches back to an incident before her marriage and for the first time gives to that incident a legal con-

sequence which shatters the marriage. On her marriage in 1942, her status was vested in light of the then existing law. The great interest of society in maintaining the existence and sanctity of the Swartz family, *Maynard* v. *Hill,* 125 U.S. 190, 211, arose in 1942, giving to each spouse a status which cannot lightly be destroyed.

The vice in the effort of the United States to destroy the marital status of the petitioner wife is its retroactive nature. It is that retroactive characteristic that "shocks the sense of fair play—which is the essence of due process." *Galvan* v. *Press,* 346 U.S. 522, 530. And it is that characteristic that gives rise to the important and novel constitutional issues in this case that deserve the full review powers of this Court.

2. The Decision Below Affords an Opportunity for This Court to Reexamine Its Conclusion That the Ex Post Facto Clause Does Not Prohibit Retroactive Application of Deportation Laws.

The Court of Appeals held that the decision of this Court in *Mulcahey* v. *Catalanotte,* 353 U.S. 692, foreclosed the contention of the petitioner husband that the *ex post facto* clause of the Constitution outlawed the retroactive application to him of Section 241(a)(11) of the Immigration and Nationality Act of 1952.

This Court's conclusion that Congress may legislate retrospectively in this way was reached with the greatest of reluctance, based upon the principle of *stare decisis.* It was reached with two of the Justices calling for a reconsideration of the application of the *ex post facto* clause "with a view to applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishments, retrospec-

tively imposed by Congress." 353 U.S. at 691. And the conclusion was reached in the context of a situation totally unlike that present here, where the deportee's wife is asserting her own constitutional objections to the threatened deportation.

Not until 1955, in *Marcello* v. *Bonds,* 349 U.S. 302, was this Court faced with a truly retrospective use of the deportation power. By that time, however, the prior dicta relating to the constitutional validity of such use had been uncritically repeated so many times that the Court could "perceive no special reasons, however, for overturning our precedents on this matter." 349 U.S. at 314.

But the lack of enthusiasm for this result, thought to be compelled by the doctrine of *stare decisis,* has been plainly evident. In *Harisiades* v. *Shaughnessy,* 342 U.S. 588, 594, the Court stated:

> "It has always been considered that that which it [the *ex post facto* clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original propositions might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them."

And in *Galvan* v. *Press,* 347 U.S. 522, 530-531, the Court said:

> ". . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in

> regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto clause, even though applicable only to punitive legislation, should be applied to deportation. But the slate is not clean."

But here the slate is clean in an important sense. The validity of retroactive deportation proceedings has been sustained only recently and with obvious reluctance. Reconsideration of that result is here sought under circumstances where new and different considerations are present. The distinguishing facts and considerations relate to the constitutional right of the petitioner wife which has been invaded by the application of Section 241(a)(11).

The retroactive deportation power, in other words, must now be reexamined in light of the asserted conflict of that power with the substantive due process right of the petitioner wife under the Fifth Amendment. It is that conflict which was absent in all prior decisions and which makes the slate clean so that this Court can now retest the retroactive deportation power not only in terms of the *ex post facto* clause but also in view of other constitutional provisions that may be applicable. Under these circumstances, the Court is free to disregard the dicta which it has previously considered binding and to examine the problem of retroactivity so as to give full and realistic effect to the *ex post facto* clause.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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MAY 23, 1958.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14029

JOSEPH SWARTZ and FREDA SWARTZ, *Appellants*

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided February 27, 1958

Mr. Richard Schifter, with whom *Messrs. Max M. Kampelman and Eugene Gressman* were on the brief, for appellants.

Mr. Carl W. Belcher, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Messrs. Lewis Carroll* and *Robert J. Asman*, Assistant United States Attorneys, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Our two appellants are husband and wife. He was lawfully admitted to the United States in 1908 and in 1930 was convicted for violation of the Narcotics Act. In 1942 they were married, she being a naturalized citizen. In 1953 deportation proceedings against the husband were brought under the Immigration and Nationality Act of 1952.[1] In February,

[1] 66 STAT. 204, 8 U.S.C.A. § 1251(a)(11).

1955, deportation was ordered, on the ground of his conviction. Appellants then filed a complaint in the District Court for declaratory judgment and injunctive relief. The District Court rendered judgment for the Attorney General on the pleadings.

On this appeal appellants present two questions. The first question is whether the statute, providing for deportation of an alien who "has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs," is unconstitutional by reason of the *ex post facto* clause of the Constitution. This question has been decided adversely to appellants by the Supreme Court in *Mulcahey* v. *Catalanotte*.[2]

The second question is whether the marriage in 1942 gave the appellant wife a contract right or a marital status which is so protected by the due process clause of the Fifth Amendment that her husband could not be deported by the retrospective application of a 1952 act of Congress. Appellants argue that the due process clause gave her a right, upon marriage, to establish a home, create a family, have the society and devotion of her husband, etc.; and that to deport her husband by the retrospective application of a statute would unconstitutionally destroy that marital status. But the essence of appellants' claim, when it is analyzed, is a right to live in this country. Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created. The physical conditions of the marriage may change, but the marriage continues. Under these circumstances we think the wife has no constitutional right which is violated by the deportation of her husband.

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[2] 353 U.S. 692, 1 L. Ed. 2d 1127, 77 S. Ct. 1025 (1957).

Arguments similar to those here presented by our appellants were faced by the Supreme Court in *Harisiades* v. *Shaughnessy*[3] and *Knauff* v. *Shaughnessy*.[4] Those cases are not precisely in point, but they involved similar problems, on which the Court's views were in accord with those we here express.

The judgment of the District Court is

Affirmed.

BAZELON, *Circuit Judge*, concurs in the result.

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[3] 342 U.S. 580, 96 L. Ed. 586, 72 S. Ct. 512 (1952).

[4] 338 U.S. 537, 94 L. Ed. 317, 70 S. Ct. 309 (1950).